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In The Supreme Court of The United States

October Term, 1967

DONALD J. LANNOM,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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IN THE

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Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioner, Donald J. Lannom; prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit entered in the above-entitled cause on August 23, 1967.

CITATIONS TO OPINION BELOW

The opinion of the Court of Appeals of August 23, 1967 is not reported at this date, but is set forth verbatim in Appendix A.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1), Rule 22(2), Rules of the Supreme Court, and Rule 37(c) of the Federal Rules of Criminal Procedure.

QUESTION PRESENTED

Can the unaided act of a United States Government Agent form the basis for the criminal conviction of another person?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The constitutional provision involved is the Fifth Amendment to the Constitution, set out verbatim in Appendix B. The statutory provision involved is Title 21, U.S.C., §176(a), set out verbatim in Appendix C.

STATEMENT

Petitioner was charged in a three-count indictment filed in the Southern District of California, Southern

Division, with a violation of Title 21, U.S.C., §176(a) (two counts), and a violation of Title 26, U.S.C. §4755 (a)(1) (one count). A copy of the indictment is set out verbatim in Appendix D. (Clerk's Transcript, pp. 2-4.) Reference hereafter to the Clerk's Transcript will be designated C.T., and to the Reporter's Transcript as R.T.

He was eventually convicted of a violation of count two only, to wit, transportation and concealment of marijuana which theretofore had been imported into the United States contrary to law (R.T., pp. 3; 18). Pursuant to said conviction, he was, on the 25th day of May, 1966, committed to the custody of the Attorney General for a period of five years (R.T., p. 19). On the same date, a timely notice of appeal was filed (R.T. p. 20).

On August 23, 1967, the United States Court of Appeals for the Ninth Circuit filed an opinion affirming the judgment of conviction, one judge (the honorable Walter Ely) dissenting. A verbatim copy of said opinion is set forth as Appendix A.

A petition for a rehearing was thereafter filed, which said petition was denied on October 11, 1967.

On November 19, 1965, petitioner was stopped while driving a 1950 Mercury automobile in the City of San Ysidro, California. This apprehension resulted from instructions by Agent Clarence Spohr of the Customs Service to stop and arrest petitioner (R.T., pp. 26-27). The vehicle operated by petitioner was searched and approximately 88 pounds of marijuana was found

secreted in the automobile (R.T., p. 9). The automobile being driven by petitioner had actually been observed by customs officers to have entered the United States from Mexico shortly after 10:00 a.m. on that same date, some three and one-half hours prior to petitioner's arrest (R.T., pp. 12-13). Specific information concerning this vehicle had previously been supplied to Customs Agent Walter Gates, who in turn disseminated this to other agents (R.T., p. 23). The vehicle, however, was not searched when it entered the United States (R.T., pp. 13, 31). At the time the Mercury entered from Mexico, it was being operated by a male person of apparent Mexican extraction who was accompanied by a small child (R.T., p. 15). The Mercury was followed from the border by customs agents to the community of San Ysidro (R.T., p. 14). The Mexican driver parked the vehicle behind a laundromat where it was kept under continuous surveillance by a customs port investigator until approximately 1:25 p.m. (R.T., pp. 33-34). At that time, the surveilling agent observed a 1956 Ford convertible arrive at the parking lot (R.T., p. 35), from which two persons exited and approached the Mercury which had been driven by the Mexican (R.T., p. 35). The occupants of the Ford remained in the parking lot area for a short period of time and one of them, eventually determined to be petitioner, entered the Mercury and drove off, followed by the other man who was eventually identified as the codefendant Matchie (R.T., pp. 20, 35). The male Mexican who drove the Mercury into the United States departed shortly after he parked the vehicle and was last seen walking back toward Mexico (R.T., pp. 26; 34-35). When the surveilling agent saw the Mercury being driven off, he advised other

officers with whom he was in radio contact, and at that time Customs Agent Spohr gave "the order to arrest" (R.T., pp. 26-27; 35).

Agent Gates of the Customs Service testified that he had been contacted on November 18, 1965, the day before petitioner's arrest, at which time he received information from "a previously reliable source" (R.T., p. 44) that the following morning a 1950 light blue Mercury with a specific license number would enter the United States containing marijuana (R.T., p. 44). Gates apparently passed this information to Customs Agent Spohr on the same evening, namely, November 18, 1965. (R.T., p. 23). On cross-examination, it was brought out that the initial contact between the informant and Agent Gates had actually been made some 5 days previous to petitioner's arrest, to wit, on November 14, 1965 (R.T., p. 49). Agent Gates, the recipient of the information, admitted that he knew the name of the person who supplied the information, his physical description and the city of his residence (R.T., pp. 51, 65).

In a hearing conducted outside the presence of the jury after the government had rested its case, Agent Gates, the person to whom the informant had supplied his information, was called as a witness by the defense (R.T., p. 142). The explicitly declared purpose of this procedure was to establish that the informant was in fact a material witness on the question of guilt or innocence (R.T., pp. 142, 158). During this hearing, it was established that the informant had actually contacted Agent Gates on November 14, 1965, some 5 days before petitioner's arrest (R.T., p. 143).

At that time, Gates was told that a 1950 Mercury automobile had been purchased in Tijuana and would be used to import marijuana (R.T., p. 143). The informant told Gates the name and identity of the person who purchased the vehicle and Gates was further advised by the informant how he came to know about the purchase (R.T., pp. 143-144). On November 18, the day before petitioner's arrest, the informant again contacted Gates on two occasions. At the time of the first contact, Gates was advised that the Mercury would be driven into the United States but would not contain contraband. The purpose of this trip was to determine whether or not the Mercury had been placed on a "lookout" (R.T., pp. 144-145). On the night of November 18, the informant again contacted Gates and stated that the marijuana had been loaded into the Mercury and THIS FACT HAD BEEN WITNESSED BY THE INFORMANT who was present at the time (R.T., pp. 145-146; emphasis supplied), but the informant identified only one person by name who was present at the time of the loading (R.T., p. 146). Agent Gates was told that the vehicle would be taken to the San Ysidro area and it was believed the car would be parked around a laundromat (R.T., p. 146). Based on what the informant HAD SEEN, he told Gates that the car contained about 50 kilos of marijuana (R.T., p. 147). The informant also told Gates whether or not he had assisted in actually loading the marijuana (R.T., p. 147). Counsel for petitioner at trial, however, was precluded from obtaining an answer to the following question:

> "Q: Well, did he tell you that he helped to load it?" (R.T., p. 148).

Agent Gates' source of information also advised that there was to be a contact between the driver and the dealer upon the driver's return to Mexico and that the driver had to return before the marijuana would be picked up in the United States, although the informant did not state in so many words that the person who was to pick up the marijuana was to be notified when the driver returned (R. T., pp. 148-149).

A request that the informant's identity be revealed on the ground that he could give relevant and material testimony on the question of guilt or innocence was denied (R. T., p. 158). Defense counsel explicitly pointed out that all matters adduced pointed to the fact that the informant was not simply a "tipster" but an eyewitness to the actual loading of the contraband; was himself intimately involved in the venture (R. T., pp. 149-150), and was in fact "right in the middle" (R. T., p. 151). Despite these matters being pointed out, the request by counsel for petitioner that the informant be identified was denied (R. T., p. 158).

Contrary to the observation of the majority opinion of the Court of Appeals that: "It is further established that the appellant was not present when the car was loaded, * * *" (p. 18 Slip Opinion, Appendix A), as was specifically pointed out in the petition for rehearing (Petition for Rehearing, pp. 1-2), counsel for petitioner at trial explicitly stated to the trial court that the informant could establish the lack of petitioner's presence at the time the marijuana was loaded in addition to the lack of other pre-importation contacts:

" MR. HUGHES: I submit that that would be --

we are dealing with a circumstantial case so far as this jury is concerned. Where you have got somebody that is actually involved, this person had to be involved to supply the information so far as the purchase of the vehicle, that this defendant had nothing to do with the purchase of the vehicle, was not present when it was loaded, and more importantly might be able to supply the name or the telephone number or something with respect to the person that was contacted to make the pick up.

"All of these things I think are extremely cogent so far as circumstantial evidence of the non-responsibility of my client, that certainly if he had absolutely no contact with the vehicle at the time it was loaded, all the rest of these things, I submit that it would be extremely significant so far as the jury is concerned, and that in this case this is one of the cases where I base on what I have read, et cetera, that the informant would be able to state that although he was close to the dealer, according to Mr. Gates' testimony, that nevertheless he had never seen the defendant there, and by sort of negative evidence, so far as the lack of Lannom's participation."

(Comments by counsel for defendant at trial, emphasis supplied, R. T., pp. 150-151.)

The Court of Appeals' opinion gratuitously concludes that the request for identification of the informant was based on "nothing except mere speculation." (Slip Opinion, p. 18, Appendix A.) The opinion further concludes that "* * *, appellant was not stopped at any time from reaching the issue of the identity of the driver directly, * * *" (Slip Opinion, p. 19, Appendix A). Both of these observations were directly challenged in the petition for rehearing (Petition for Rehearing, pp. 2-4), in which it was observed that Agent Gates, to whom the informant supplied his information, was conveniently absent when the "unknown Mexican" drove the Mercury containing marijuana into the United States (R. T., pp. 31; 44-45; 126). In fact, Agent Gates specifically stated that he never ascertained the identity of the individual who drove the Mercury into the United States on November 18 when it contained marijuana (R. T., p. 145).

During the attempt of counsel for petitioner to ascertain the informant's identity, it was pointed out that in addition to other matters, the government would probably request an instruction on possession (R. T., p. 155). This point came up during the preargument conference on instructions and the Court stated that an instruction on the permissive inference from possession would be given (R. T., p. 166). Counsel for petitioner explicitly and unequivocally registered an objection to any instruction whatsoever on the inference from possession (R. T., pp. 166-168). The Court did, however, instruct the jury on possession and the inference therefrom which was permitted (R. T., pp. 182-184). This instruction, to which objection was lodged, is set out verbatim as Appendix E to this petition.

REASONS FOR GRANTING THE WRIT

1. The decision of the Court of Appeals for the Ninth Circuit is in direct conflict with principles announced by the Courts of Appeal of the Second, Third, Seventh and Eighth Circuits, and a District Court in the Fourth Circuit.

As noted in the dissenting opinion by Judge Ely, the trial court's instruction that possession of the marijuana by petitioner was sufficient to establish illegal importation and petitioner's knowledge thereof effectively eliminated from jury consideration whether the importation was actually accomplished by an agent of the United States Government.

By reason of the informant's relationship with Agent Gates of the Customs Service, it is clear that this informant was a "de facto" government employee for whom the United States was as responsible as if he wore a badge of the Customs Service.

See: United States v. Klosterman, 248 F.2d 191, 196 (3rd Cir. 1957);

Carson v. United States, 310 F.2d 558, 561 (9th Cir. 1962);

Henderson v. United States, 261 F.2d 909 (9th Cir. 1958);

United States ex rel Hassel v. Mathues, United States Marshal, 22 F.2d 979 (E.D. Pa. 1927).

The trial court's instruction, over objection, that possession of the marijuana was sufficient evidence of illegal importation and knowledge of such, which instruction was approved by the Court of Appeals for the Ninth Circuit, directly conflicts with principles enunciated by other circuits that an individual may not be vicariously punished for unaided acts committed by a government agent for which the agent could not be held criminally responsible.

> "As to the three remaining overt acts, we are of the opinion that government officers should not so far participate as themselves to perform unaided by any of the conspirators the crucial act of introducing the liquor into the forbidden territory. They may properly afford opportunity to those suspected of crime to commit the original offense. They may be participants to a certain extent, but they, themselves, may not unaided, as in this case, do the very overt act which is essential to the consummation of the offense charged."
>
> De Mayo v. United States, 32 F.2d 472, 474 (8th Cir. 1929).
>
> "'If, from the evidence you have a reasonable doubt as to whether or not the Government itself caused the marihuana referred to in the indictment to be imported into the United States, if indeed it was imported into the United States, then you must find the defendant

not guilty.'

"The finding of guilt inferentially indicates that the jury did not believe the Government had unlawfully imported the marihuana in question. There is no issue before us as to the sufficiency of the evidence to support that result."

United States v. Davis, 272 F.2d 149, 152 (7th Cir. 1959).

See also: United States v. Prince, 264 F.2d 850 (3rd Cir. 1959), holding that it was error to fail to instruct that if the defendant was acting as a procuring agent for a government official that he was not guilty of sale of heroin in violation of Title 21, U.S.C., §174.

United States v. Zerbst, 111 F. Supp. 807, 811 (E.D.S.C. 1953; 4th Cir.), holding that where a treasury agent transported liquor that a defendant could not be guilty of aiding and abetting such transportation.

2. The instant petition presents an important question of law, to wit, the correct application of the Court's decision in Roviaro v. United States, 352 U.S. 53 (1956), although this decision points out that in many instances the question of whether an informant's identity is or is not material on the question of guilt or innocence must be decided on an ad hoc basis (352 U.S. 53, at page 62), it is submitted, however, that the decision of the Court of Appeals for the Ninth Circuit, of which review is herein sought, in effect eliminates

the holding of this Court in Roviaro v. United States, supra, pages 60-61, to the effect that the privilege of non-disclosure so far as the informant's identity must give way when this disclosure is helpful to the defense of an accused. The record of trial in the instant case unequivocally establishes that the informant was an intimate participant in the events which culminated in petitioner's arrest. It is patently obvious that this individual, should his identity have been revealed, could have given testimony of critical importance to the defense. Petitioner's participation consisted merely of getting into an automobile and driving it from a parking lot to a point a short distance away where he was arrested by agents of the United States. On the other hand, Agent Gates' informant knew not only when the vehicle in which petitioner was arrested had been purchased but the fact that it had been driven into the United States on one occasion "unloaded" and the exact details of how the smuggling was to be accomplished, including the exact amount of the contraband. It is not only possible but highly probable that the supplier of Gates' information was the actual driver of the Mercury when it crossed from Mexico into the United States. By reason of the trial court's ruling as approved by the Court of Appeals for the Ninth Circuit, an exploration into this probability was completely precluded. Petitioner, therefore, respectfully submits that the Circuit Court's opinion, in effect, overrules this Court's decision in Roviaro v. United States, supra, and that review of this important question should therefore be granted.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

PETER J. HUGHES

Counsel for Petitioner

APPENDIX "A"

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

DONALD F. LANNOM, *Appellant,* vs. UNITED STATES OF AMERICA, *Appellee.*	No. 21,243

[August 23, 1967]

Appeal from the United States District Court
for the Southern District of California
Southern Division

Before: CHAMBERS and ELY, Circuit Judges; and
FERGUSON, District Judge

FERGUSON, District Judge:

Appellant was convicted in a jury trial for violation of 21 U.S.C. § 176(a), by an information which charged that he, with intent to defraud the United States, knowingly concealed and facilitated the transportation and concealment of approximately 88 pounds of marihuana, which marihuana, as he well knew, had been brought into the United States contrary to law.

Appellant seeks reversal on the basis of four asserted errors: (1) refusal to require disclosure of the identity of an informer in order to test his reliability on the issue of probable cause for search and seizure; (2) refusal to require disclosure of the informer on the issue of guilt or innocence; (3) an instruction to the jury that possession was evidence of illegal importation and knowledge thereof; and (4) the evidence was insufficient as a matter of law to sustain the conviction.

On November 18, 1965, the day before the arrest, Customs Agent Walter Gates, stationed at the San Ysidro border station, across from Tijuana, Mexico, was told by an informant that a blue 1950 Mercury, California license EIC 132, would enter the United States from Mexico the next morning sometime after 9:00 o'clock. Agent Gates was told that the Mercury would contain a quantity of marihuana, would be driven into San Ysidro, parked at a laundromat, and picked up when the driver had returned to Mexico. Agent Gates had known the informant for about six years, and he had provided information that had led to three previous arrests, one of which was four months prior to the arrest of appellant. Agent Gates told Customs Agent Clarence Spohr of the information he had received and directed Spohr to stand by for a surveillance.

At 10:08 A. M. on November 19, 1965, Customs Agent Donald Carter observed the Mercury cross the border, driven by an adult male, with a child as a passenger. After entering, it was driven off the highway and parked behind a laundromat in San Ysidro. The driver and the child left the automobile and walked toward the border.

Agent Carter and Customs Investigator Gore had the Mercury under constant surveillance. At approximately 1:25 P. M. Investigator Gore watched a 1956 Ford park near it. Two men, one of them the appellant, got out, walked over to the Mercury and looked inside. One of them twice got in and out. Five minutes later the appellant entered the Mercury and drove it away. When informed of this by radio, Agent Spohr gave an order to arrest the driver. Twenty minutes later, at a point 1½ miles from the border, the Mercury was stopped by Customs Agent Thaine Ellis. Investigator Gore, who had been following, removed an interior side panel and found a package of marihuana. The automobile was returned to the border station where a thorough search revealed approximately 88 pounds of marihuana, most of which was in a metal container welded under the frame.

The government agents did not have a search warrant nor a warrant of arrest. They had paid the informer $200.00 for the information that he had supplied. The marihuana was worth $1,560.00 in Mexico.

Prior to trial the appellant moved to suppress, claiming the marihuana to have been obtained as the result of an unlawful search. The motion was denied on the ground that the search was a border search.

At the trial, outside the presence of the jury, Agent Gates was called by the defense for the purpose of establishing that the informant was a material witness on the question of the appellant's guilt or innocence. At this hearing it was established that the informant initially contacted Agent Gates on November 14th. Gates was told that a 1950 Mercury had been purchased in Tijuana and would be used to import marihuana. He was given the name and identity of the purchaser. On November 18th, the day before the arrest, the informer contacted Gates twice. The first time he told Gates that the Mercury would be driven into the United States but would not contain contraband, the purpose being to determine whether or not it had been placed on a "lookout". At the second contact, Gates was told that the marihuana had been loaded, this having been witnessed by the informant. A motion that his identity be revealed on the ground that he could give material testimony on the question of guilt was denied.

With respect to the issue of revealing the identity of the informer for the purpose of testing his reliability, appellant concedes the rule that a border search is an exception to the general requirement of probable cause which must support a search. *Alexander v. United States,* 362 F.2d 379 (9th Cir. 1966), cert. denied, 385 U.S. 977 (adv.) (1966). He contends, however, that the search here was not a border search for the reason that the appellant had not driven the automobile into the United States.

After the appeal and briefs were filed in this case, *Rodriguez-Gonzales v. United States,* ..... F.2d ..... (9th Cir. 1967), was decided on May 11, 1967. The facts there were almost identical with those here. In both cases the appellants were not present when the automobiles were driven across the border but drove them away after they had been parked in the United States. In *Rodriguez-Gonzales* this Court held that the search was a valid border search. The trial court here was correct in so finding. Further justification for denying the motion is set forth in *McCray v. Illinois,* 386 U.S. 300 (adv.) (1967), where it was held

that the identity of the informer need not be disclosed on the issue of probable cause.

Appellant alleges, however, that the informer's identity should be disclosed as he was a material witness on the question of guilt. It was established that the informer was present when the marihuana was placed in the automobile in Mexico. It is further established that the appellant was not present when the car was loaded, nor was the informer present when the appellant was arrested in the United States. In *Roviaro v. United States*, 353 U. S. 53 (1957), it was held that the informer there must be disclosed when he was an active participant in the crime in that he "had taken a material part in bringing about the possession of certain drugs by the accused, had been present with the accused at the occurrence of the alleged crime, and might be a material witness as to whether the accused knowingly transported the drugs as charged". 353 U. S. at 55. The "informer was the sole participant, other than the accused, in the transaction charged". 353 U. S. at 64.

Here the trial judge asked "for some tangible evidence that would allow the Court to find that the informant could be of assistance in the defense of the case". No such evidence was presented, and the record discloses nothing except mere speculation. The trial court was eminently fair in protecting the rights of the appellant. It sought in all ways possible, outside the presence of the jury, to have appellant present any evidence whatsoever that the identity of the informer could assist in his defense. Mere speculation that the informant might possibly be of some assistance is not sufficient to overcome the public interest in the protection of the informer. See *McCray v. Illinois, supra.* The claim that the informant was a participant was merely hopeful thinking. *Hurst v. United States*, 344 F.2d 327, 328 (9th Cir. 1965).

Appellant, however, contends that the denial of the identity of the informer foreclosed him from showing that the informer was the driver of the Mercury into the United States. The trial court precluded the appellant from determining whether or not the informer actually loaded the marihuana into the automobile. From this appellant claims he was not permitted to explore the possibility of the informer transporting it across the border. It is argued that if the description of the informer would have

matched that of the driver then it would have been established that the informer was the driver. However, appellant was not stopped at any time from reaching the issue of the identity of the driver directly, and he has no just cause to claim error. In fact he asked the agents if the informer ever told them that he was the driver and was told that the informer did not. His position is similar to that in *Miller v. United States*, 273 F.2d 279 (5th Cir. 1959), cert. denied, 362 U. S. 928 (1960). "If the informer's relation to the acts leading directly to or constituting the crime may be assumed from a fertile imagination of counsel, the Government in practically every case would have to prove affirmatively that the informant had not done any such likely acts. Having done that, all would be revealed and the informer privilege, deemed essential for the public interest, for all practical purposes would be no more." 273 F.2d at 281.

Appellant argues that it was error to include the statutory possession presumption under 21 U.S.C. § 176a in the instructions to the jury. He claims that the following in *Erwing v. United States*, 323 F.2d 674 (9th Cir. 1963), is applicable:

> ". . . we are of the opinion that there is no rational connection between the unexplained possession of the cocaine hydrochloride and the presumed fact that such narcotic drug was illegally imported to the knowledge of the appellant, and that the inference of the one from the proof of the other is arbitrary because of lack of connection between the two in common experience." 323 F.2d at 682.

A complete answer is found in *Klepper v. United States*, 331 F.2d 694 (9th Cir. 1964):

> "The Mexican origin of the drug and its unlawful importation was established by the eyesight of the border officials: They *saw* the vehicle, in which the marihuana was concealed, physically come across the imaginary border line. What better proof is needed?" 331 F.2d at 702.

Lastly, it is claimed that the evidence is insufficient to support the verdict. The same charge was made in *Rodriguez-Gonzales v. United States, supra*, and it was held that the assertion was patently without merit.

Affirmed.

ELY, Circuit Judge (Dissenting):

I respectfully dissent. The district judge, in line with the offense which was charged, properly instructed the jury that it was required to determine, as a requisite for conviction, "that the defendant knew that the marijuana had been imported or brought into the United States contrary to law."

The Government had been informed that the importation would occur in the Mercury automobile, specifically identified. Its agent actually observed the transportation across the international frontier. He saw the driver of the vehicle in which the contraband was concealed. That driver was not the appellant,[1] and his identity was either known to the Government or might, by it, have been easily ascertained. The prosecution refused the request of the accused that he be supplied with the name of the informer, and I do not now question the refusal of the district judge to require the requested revelation. I do, however, because of the circumstances which I have outlined, challenge the propriety of authorizing the jury to infer, from the fact of the accused's subsequent possession of the contraband, that the accused "knew that the marijuana had been imported into the United States, illegally, contrary to law."[2]

The prosecution should have been required to prove, at the very least, that the Government itself did not, through one of its own agents, accomplish the importation. If the Government itself imported the marijuana, it is indeed anomalous that it is now permitted to say that the accused "knew" that the substance had been imported "illegally, contrary to law." Believing it to have been erroneous to instruct the jury as to the presumption in the light of the peculiar facts of this case and the lack of

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[1]In *Klepper v. United States*, 331 F.2d 694 (9th Cir. 1964), emphasized by the majority, border police observed the automobile in which contraband was concealed as it crossed the border. The vehicle was being driven at that time by an identified friend of the accused, and the accused was observed as a passenger.

[2]When the accused objected to the instruction, it appears that the Government attorney himself questioned its applicability. Said he, "What I am saying is that since we have direct evidence of the smuggling by the person who drove it in, I don't see any need to use the statutory presumption to prove that it was imported."

proof in the particular which I, in the circumstances, would require, I would reverse.[3]

---

[3]I cannot see that the majority attempts to answer the question which troubles me. Significantly, it does not mention the two cases upon which the Government, in its brief, relies. These are *Haynes v. United States*, 319 F.2d 620 (5th Cir. 1963), *cert. denied*, 375 U.S. 885, 11 L.Ed.2d 115, 84 Sup.Ct. 161 (1963), and *Miller v. United States*, 273 F.2d 279 (5th Cir. 1960), *cert. denied*, 362 U.S. 928, 4 L.Ed.2d 747, 80 Sup.Ct. 756 (1960). Neither is in point.

Compare *United States v. Taylor*, 266 F.2d 310 (7th Cir. 1959), *cert. denied*, 361 U.S. 853, 4 L.Ed.2d 92, 80 Sup.Ct. 96 (1959), wherein Government agents, informers, did not transport the contraband until it had already been imported into the United States.

APPENDIX "B"

CONSTITUTION OF THE UNITED STATES

AMENDMENT V

Criminal Proceedings and Condemnation of Property

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

APPENDIX "C"

176 a. United States Code. Smuggling of marijuana; penalties; evidence; definition of marijuana

Notwithstanding any other provision of law, whoever, knowingly, with intent to defraud the United States, imports or brings into the United States marihuana contrary to law, or smuggles or clandestinely introduces into the United States marihuana which should have been invoiced, or receives, conceals, buys, sells, or in any manner facilitates the transportation, concealment, or sale of such marihuana after being imported or brought in, knowing the same to have been imported or brought into the United States contrary to law, or whoever conspires to do any of the foregoing acts, shall be imprisoned not less than five or more than twenty years and, in addition, may be fined not more than $20,000. For a second or subsequent offense (as determined under section 7237(c) of the Internal Revenue Code of 1954), the offender shall be imprisoned for not less than ten or more than forty years and, in addition, may be fined not more than $20,000.

Whenever on trial for a violation of this subsection, the defendant is shown to have or to have had the marihuana in his possession, such possession shall be deemed sufficient evidence to authorize conviction unless the defendant explains his possession to the satisfaction of the jury.

As used in this section, the term "marihuana" has the meaning given to such term by section 4761 of the Internal Revenue Code of 1954.

For provision relating to sentencing, probation, etc. see section 7237(d) of the Internal Revenue Code of 1954. Feb. 9, 1906, c. 100, §2(h), as added July 18, 1956, c. 629, Title I, § 106, 70 Stat. 570.

APPENDIX "D"

IN THE UNITED STATES DISTRICT COURT
IN AND FOR THE SOUTHERN DISTRICT OF CALIFORNIA
SOUTHERN DIVISION

SEPTEMBER, 1965, GRAND JURY - SOUTHERN DIVISION

UNITED STATES OF AMERICA, Plaintiff, vs. JERRY FRAZER MATCHIE, DONALD JAMES LANNON, Defendants.	No. 35939 -SD INDICTMENT (U. S. C., Title 21, Sec. 176(a) - Illegal importation of marihuana; U. S. C., Title 21, Sec. 176(a); U. S. C., Title 18, Section 2 - Concealment of illegally imported marihuana; aiding and abetting; U. S. C., Title 26, Sec. 4755(a) (1); Illegal importation of marihuana without payment of tax.)

The Grand Jury charges:

COUNT ONE
(U. S. C., Title 21, Sec. 176(a))

On or about November 19, 1965, in San Diego

County, within the Southen Division of the Southern District of California, defendants JERRY FRAZER MATCHIE and DONALD JAMES LANNON, with intent to defraud the United States, knowingly smuggled and clandestinely introduced into the United States from Mexico approximately eighty-eight pounds of marihuana, which marihuana should have been invoiced, and knowingly imported and brought into the United States from Mexico said marihuana contrary to law, in that said marihuana had not been presented for inspection, entered and declared as provided by United States Code, Title 19, Sections 1459, 1461, 1484 and 1485.

COUNT TWO
(U. S. C., Title 21, Sec. 176(a))
(U. S. C., Title 18, Section 2)

On or about November 19, 1965, in San Diego County, within the Southern Division of the Southern District of California, defendant DONALD JAMES LANNON, with intent to defraud the United States, knowingly concealed, and facilitated the transportation and concealment of approximately eighty-eight pounds of marihuana, which marihuana, as the defendant then and there well knew, had been imported and brought into the United States contrary to law; and defendant JERRY FRAZER MATCHIE knowingly aided, abetted, counseled, induced and procured the commission of the aforesaid offense.

COUNT THREE
(U. S. C., Title 26, Sec. 4755(a)(1))

On or about November 19, 1965, in San Diego County, within the Southern Division of the Southern

District of California, defendant DONALD JAMES LANNON, being a person required to register and pay the special tax under the provisions of Sections 4751 and 4753, Title 26, United States Code, did unlawfully import approximately eighty-eight pounds of marihuana, without having so registered and paid such tax.

A TRUE BILL

_____
Foreman

MANUEL L. REAL
United States Attorney

_____
Asst. United States Attorney

PWJ/rs

APPENDIX "E"

Court's Charge to the Jury on Possession:

"Now, regarding the knowledge of the defendant that the marijuana had been brought into the United States contrary to law -- that is, if you find, first, that the defendant knew, for instance, that the automobile contained marijuana, and if you find beyond a reasonable doubt that there was knowledgeable possession, as I will define that term to you in a moment, on the part of the defendant of the marijuana referred to in the indictment, such possession creates a permissible inference that the marijuana had in fact been imported contrary to law and that the defendant knew that the marijuana had been imported into the United States illegally, contrary to law.

"Now, this inference does not in any way shift the burden of proof from the government to the defendant. And against the inference, there is also a permissible inference that you may draw that the defendant did not know that the marijuana was imported contrary to law.

"Now, in regard to possession, possession may be actual or it may be constructive.

"A person who has direct physical control over a thing, such as you have over your pocketbook which is in your pocket or your purse which you are carrying, is in actual possession. If you leave something in the glove compartment of your car, and lock it, or leave it there and you leave your car in a parking lot, you still have constructive possession of that article. However, of course, you must know that it is there, but you have

constructive possession.

"Two or more persons may have possession of a thing. Then possession is joint. Or they may have actual or constructive possession.

"Now, if you find from the evidence beyond a reasonable doubt that the accused either jointly or alone, jointly with others or alone, had knowledgeable possession, actual or constructive possession of the marijuana, then you may find that the marijuana was in the possession of the accused within the meaning of the word 'possession' as used in the instructions.

"Now, as I say, it turns upon whether you find that the accused knew that the marijuana was in the automobile. The only thing that the inference -- or the permissible inference which you may draw is to supply evidence upon which you can find, which you may find, that the defendant knew or, rather, first, that the marijuana was imported contrary to law and, secondly, find that he had knowledgeable possession, that he knew that the marijuana had been imported into the United States contrary to law." (R. T., pp. 182-184).